

Statement Before
The Insurance & Real Estate Committee
Tuesday, February 26, 2013

Re: SB 955: An Act Concerning Pharmacy Audits

Good Afternoon Senator Crisco, Representative Megna and members of the Insurance Committee. My name is Margherita Giuliano and I am both a pharmacist and the Executive Vice President of the Connecticut Pharmacists Association. The Connecticut Pharmacists Association is a professional organization representing 1000 pharmacists in the state of Connecticut. I am here today to speak to **SB 955: An Act Concerning Pharmacy Audits**.

This proposed audit legislation is simply asking for fair treatment of pharmacies during the audit process conducted on behalf of Pharmacy Benefit Managers (PBMs) or plan sponsors. This legislation is needed in order to take the powers of prosecutor, judge, and jury out of the hands of PBMs when it comes to pharmacy audit practices, and standardizes a currently unregulated business practice that is impacting pharmacies all across Connecticut, as well as across the nation. Currently there are 22 states that have passed audit legislation and many other states where legislation is being introduced.

I want to be very clear so that the Committee understands that Pharmacists are not here asking for more money and we definitely are not here to protect those who commit fraud, waste or abuse. If a pharmacy is committing fraud, waste or abuse, we fully support turning them over to the appropriate regulatory board and action must be taken.

What we are asking is for you to pass legislation like many others states have already done – or are doing. PBM Audit Practices have become so predatory that national companies have been formed to help pharmacies with audits. One company, Pharmacy Audit Assistance Service (PAAS), has helped pharmacies recover more than \$74 million in inappropriate audit charge backs.

In reviewing this proposed language, we were very happy to see that it includes several substantive components. I have outlined a few areas that I would like to elaborate upon, as well as a few areas where I would like to request clarification as to intent:

- Establish a reasonable time frame for the announcement of an audit to allow proper retrieval of records under review. (*This legislation seeks a 14 day written notice- which we agree with*)
 - A PBM audit of a pharmacy typically involves the PBM reviewing numerous selected prescription records and supporting documents. Sufficient advance notice of an audit allows the pharmacy to retrieve the needed prescriptions and claim records for that PBM prior to the auditor physically arriving at the pharmacy. This advance notice allows the pharmacist to keep the pharmacy open and continue to serve patients while the auditor is reviewing the needed records. Similarly, the IRS and others provide individuals with advance notice of an audit to give them sufficient time to gather the needed records and information and routinely postpones audits for these purposes.

- This legislation also asks that audits not be conducted during the first 5 days of the month unless agreed to by the pharmacy being audited.
 - The first 5 days of the month in a pharmacy are challenging with prescription benefit plans changing, and the patient volume is higher. Avoiding these days is a professional courtesy.
- Establishes guidelines for PBMs to follow regarding patient confidentiality
 - Sections 3(b)(1), (2), and (3) need clarification as to what the language is actually stating.
 - We would respectfully request that an entity conducting an audit for a PBM or Plan sponsor only has access to the information that they are there to review. This section seems to allow access to previous audit reports of a pharmacy. This should have no bearing and should be removed from the language.
- Payment to an entity conducting an audit should not be based on the amount claimed or the amount recouped from the pharmacy being audited
 - We have heard stories of auditors being relentless in their findings because their payment was based on a percentage of the money recouped. It also begs the question as to if any of the money recouped is returned to the Plan Sponsor? I don't think the patients receive their co-pays back, although they are recouped.
- Mandates PBMs must allow for valid documentation, consistent with the Connecticut Pharmacy Commission's rules and laws and reinforces that the State Board determines what constitutes a valid prescription.
 - The nature and content of record keeping required of pharmacies and pharmacists is regulated by State Boards of Pharmacy and federal regulation. For example, State Boards of Pharmacy currently regulate content and format of prescription labeling and the Drug Enforcement Administration (DEA) regulates the record keeping required for controlled substances. PBMs that require recordkeeping in excess of that required by state or federal law are infringing upon the regulatory authority of these government entities. In addition, pharmacies typically deal with multiple PBMs. If each PBM were to layer additional recordkeeping requirements over those currently required by state and federal law, this system quickly becomes unmanageable.
- Requires the consultation of a licensed pharmacist if the audit involves clinical or professional judgment
 - Requiring a licensed pharmacist conduct or be consulted in an audit ensures there is someone who is cognizant of and familiar with the specific standards of practice and the requisite nuances of the pharmacy statutes and regulations.
- Limits the pharmacy audit period to not more than 24 months after the date a claim was submitted by the pharmacy to the PBM or plan sponsor unless a longer period is required by law.
 - Keep in mind that the pharmacy claims that are being audited by the PBM are ones that have already been approved by the PBM when they were initially submitted.
- Require that the company auditing the pharmacy provides a preliminary audit report to the pharmacy within 60 calendar days and allows at least a 30 day period for the pharmacy to respond
 - Many of these pharmacies are small business people and it is time-consuming and costly for them to gather information to respond to the alleged mistakes or discrepancies. Giving them appropriate time to address these issues is critical

- Allows pharmacies to validate the pharmacy record and delivery records as well as validating claims in connection with prescriptions or changes in prescriptions by using any valid prescription
 - These provisions would simply allow pharmacists to submit supporting documentation or affidavits of healthcare practitioners (i.e., prescribing physicians) to clarify possible questions regarding the details of a prescription and the actual drug and amount thereof dispensed. There have been reports in which PBMs have not allowed pharmacists to use these valid contributions of other healthcare providers to justify their actions and pharmacists have simply been financially penalized.
- Eliminates the highly questionable practice of extrapolation as justification for taking back claim money.
 - The language used in this legislation is confusing and needs clarification.
 - Extrapolation is a highly questionable statistical technique in which a small representative sample--in this case a few prescriptions-- is extracted from the total number of prescriptions filled for the particular PBM. The number of errors detected in the small sample is then extrapolated across the entire pool of examples to arrive at a questionably inflated number of discrepancies and corresponding penalties. Extrapolation has been widely criticized as an auditing technique and a number of states have passed legislation to prohibit its use (AK, FL, GA, MO, NM, TN, MD, and ID).
- Provides for a process for a pharmacy to appeal a final pharmacy audit report within 30 days after receiving the final report
- Eliminates the unfair take back of money when no financial harm has occurred to the plan sponsor, PBM or patient by a typographical error.
 - When talking about clerical or recordkeeping errors, we are talking about typographical errors or computer errors. PBMs justifiably audit pharmacies in order to detect any improper payment by the PBM on behalf of the plan or consumer. However, many times PBMs fine or penalize pharmacies for even the slightest typographical errors even in the absence of any evidence of intent to defraud or in the absence of any financial harm to the PBM, the plan sponsor or the patient. These provisions would ensure that the pharmacy is only penalized for those mistakes that resulted in actual harm, financial or otherwise, to any interested party. These provisions would remove the incentive for the PBM to penalize pharmacies for inadvertent errors when no harm, financial or otherwise, resulted to any interested party. If a prescription is filled for "31 days" and the prescription was supposed to be filled for "30 days," the PBM should be entitled to take back the "extra day supply" but not the whole 30 day prescription.
- Sets standards on the audit report for both the auditing entity and the pharmacy, giving structure to the auditing process.
- Requires that no money be recouped until the appeal process has been completed and no interest accrued.
- Outlines fraud, waste, or abuse as not tolerated and mandates such actions be reported to the licensing board. We would strongly recommend that the language beginning on line 129 of this

legislation be replaced with the following language to make it more consistent with the intent of the legislation:

- *The provisions of this section shall not apply to a pharmacy audit when fraud, criminal wrongdoing or willful misrepresentation is evidenced by the review of claims data, statements, physical review, or other investigative methods.*

We would be very interested in working with the Committee to establish an audit bill that is fair to our pharmacies and is clearly stated. As many of you know, pharmacies have been hit legislatively over the past few years. This proposed legislation for audits is something that our profession would welcome, if it in fact contains these “business friendly” components.

In my estimation, none of these guidelines are unreasonable, nor would they cost the State of Connecticut any money while streamlining a process that pharmacies must undergo. I would like to thank the Committee for their interest in this area and also recommend that you review two pieces of model legislation that have been adopted or are in the process of being adopted in other states.

It is our opinion that it may make more sense from both a time and collaboration perspective to not re-create the wheel, but to work from legislation that has already been vetted and agreed to by all interested parties namely, both the pharmacists and the PBMs.

We would highly recommend the audit legislation that is law in North Dakota. In addition, Montana is very close to implementing language in their state for pharmacy audits. I have copies of both that I will leave with the Clerk, and would welcome the opportunity to continue this dialogue so that the State of Connecticut may join the increasing ranks of states that have this type of legislation on its books.

Thank you again for your time and interest.